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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-157802, B-200768, DATE: December 16, 1981
B-200850
MATTER OF: American Chemical Society

DIGEST:

Prohibition in Federal incorporation charter regarding compensation prevents American Chemical Society (ACS) from receiving normal cost-plus-fixed-fee contract to give ACS reasonable return on work for Government. In view of Court of Claims decision in American Chemical Society v. United States, 438 F.2d 597 (1971), prior decisions holding that ACS could not be paid mortgage interest under Federal contracts, will no longer be followed.

The American Chemical Society (ACS) has asked us to reconsider our prior position concerning whether, under the provisions of ACS's Federal Incorporation Statute, it may receive a fee or a profit on its contracts with the Federal Government.

Our attention has been called to two contracts ACS currently has with the United States Environmental Protection Agency (EPA) and the National Library of Medicine, Department of Health and Human Services (HHS), respectively. In both instances the agency took the position that ACS's charter precluded the payment of any profit to ACS under these contracts.

A review of the background relating to this matter is helpful. On April 19, 1966, we issued decision B-157802 (45 Comp. Gen. 638) in response

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to a request by the then Secretary of Health, Education, and Welfare concerning a request by the ACS for an amendment to a contract with the National Institutes of Health. ACS, during negotiations, had requested payment of a fee of \$7,400 or, in the alternative, reimbursement for mortgage interest on a building owned by ACS in which the contract was to be performed. The \$7,400 figure was the approximate cost of mortgage interest over the contract period on that portion of the building to be used for the contract work.

In advising the Secretary that we did not believe such a payment was proper, we cited the ACS's Federal incorporation statute which states:

"That the American Chemical Society shall, whenever called upon by the War or Navy Department, investigate, examine, experiment, and report upon any subject in pure or applied chemistry connected with the national defense, the actual expense of such investigations, examinations, experiments, and reports to be paid from appropriations which may have been made for that purpose by Congress, but the society shall receive no compensation whatever for any services to the Government of the United States * * *."
(Emphasis supplied.)

We found this charter of incorporation to preclude payment of more than actual expenses to ACS. We pointed out that while the interest was an expense to the ACS, it was not so related to the contract work in question as to constitute part of the "actual expense" of the work. Moreover, we held that the prohibition applied to all agencies of the Government, not merely the War or Navy Departments.

Subsequently, the National Science Foundation (NSF) requested our views as to the applicability of the April 19, 1966, decision to a contract which it had with the ACS under which it was making a fee

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payment representing an allocated share of mortgage interest. In B-157802, February 24, 1967, we held the prior decision applied to the NSF contract. The February 24 decision was affirmed upon reconsideration on July 7, 1967. ACS refunded the fee payment under protest and commenced an action in the United States Court of Claims to recover the fee.

On February 19, 1971, the Court of Claims decided the matter in American Chemical Society v. United States, supra, and found that ACS was entitled to the funds it had refunded. The court found that the portion of the mortgage interest allocable to the contract constituted an actual expense under generally acceptable accounting principles and that the fee paid merely represented such interest and nothing for profit. The court further concluded that, while under the Federal Procurement Regulations (FPR) interest normally is not a reimbursable cost, contractors recover interest on borrowing out of the profit margin on contracts. For these reasons, the court held that the inclusion of the mortgage interest as a fixed fee was permissible.

ACS has interpreted the Court of Claims decision as allowing ACS to negotiate a fee on its contracts with the Government to permit ACS a reasonable return or profit and requests our concurrence in this interpretation. This we cannot do.

The issue of a fee representing a reasonable return or profit to the ACS was not before the Court of Claims in the above-cited decision. In the decision, the court noted:

"* * * Their testimony is entirely consistent on the intent of the parties during the negotiation, execution and performance of this contract. That intent was that mortgage interest was recognized as an actual expense to plaintiff; that the fixed fee was negotiated to correspond to a proportionate share of that mortgage interest, and not

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as a profit; that both parties at all times intended that plaintiff recover the proportionate share of mortgage interest allocable to this contract; and that the Society in accordance with its long-standing policy had in no way attempted, even remotely, to realize, nor had it realized, any profit from performance of this contract."

. Further, the court stated:

"In this case, as the facts clearly demonstrate, the fee was specifically negotiated to represent mortgage interest expense, and nothing else. The fee is completely absorbed by mortgage interest expense, and includes nothing for profit."

We believe this shows the issue of a fee, as the term is normally used in Government contracting, was never decided by the court. Therefore, while ACS, under the Court of Claims decision may negotiate a fee which represents its actual expenses incurred, including mortgage interest, it may not negotiate an unrestricted or blanket fee which may include an element of profit. We note this view is consistent with that expressed by EPA and HHS in its comments to our Office on the matter. To the extent our earlier decisions are inconsistent with the Court of Claims decision, they will no longer be followed.

ACS also contends that its charter restrictions should only apply to defense work and not to work performed for other agencies of the Federal Government. As noted above, in our April 19, 1966, decision we found that the prohibition applied to all agencies, including nondefense agencies where the Society elects to render services for such agencies, and we find nothing advanced now by ACS which requires altering our finding. The only distinction we found between defense and nondefense services of ACS was that, under

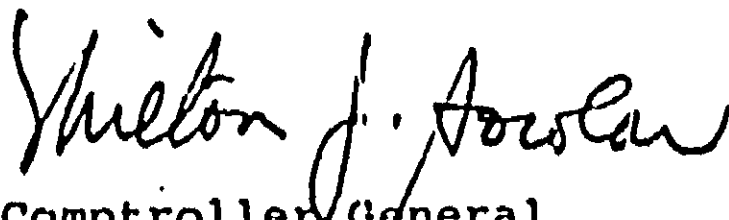
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the charter, defense related services were mandatory but the Society had an election as to whether it would perform work for other agencies. We believe ACS's argument is answered by the concluding phrase of the quoted section 4, "* * * any services to the Government of the United States," which we find all inclusive regarding the profit issue.

EPA and HHS, however, have both contended that this matter is untimely as a protest under our Bid Protest Procedures because ACS had already entered into recent modifications or extensions of its basic contracts with the agencies, while it should have raised the matter prior to execution of the contracts. We do not view this matter as a protest under our Procedures because no award of a contract is involved. We view this matter as the interpretation of ACS's charter in light of GAO and Court of Claims decisions, a recurring problem, which should be resolved.

Finally, while ACS argues that its relationship with the Government has changed since 1937 when its incorporation statute was passed by Congress, we do not find this alters the above opinion. While the Government's involvement with ACS may have changed from a mere user of ACS's facilities to a contracting party for which designated tasks are performed, the statute remains in effect. For ACS to receive the type of fee which it requests, the statute would have to be amended by Congress to allow such an unrestricted fee.

for 
Comptroller General
of the United States